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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Before The Trademark Trial and Appeal Board

Jerold Raber
17501 Dartmouth Avenue
Cleveland, Ohio 44111-3946

Petitioner,

v.

Aleda M. Kellgren
dba House of An-Ju
703 Northeast Mill St.
Leon, Iowa 51044

Registrant/Respondent

U.S. Patent & TMOfc/TM Mail Rcpt. Dt. #57



05-18-2002

Cancellation No. 30,730

Reg. No. 2,208,106

Reg. No. 2,208,108

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TRADEMARK TRIAL AND
APPEAL BOARD

PETITIONER'S (JEROLD RABER'S) REPLY BRIEF AT FINAL HEARING

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PETITIONER'S (JEROLD RABER'S) REPLY BRIEF AT FINAL HEARING

This is Petitioner's (Raber's) response to the brief filed on behalf of Respondent (Kellgren). As an overview, an examination of the Kellgren brief illustrates that she has been unable to seriously rebut most of the positions advanced by Raber. In fact most of Kellgren's evidence is built on Kellgren's self-serving statements and the alleged hearsay statements of others. Petitioner will hereinafter examine the positions and contentions put forth by Respondent.

I. KELLGREN'S CANCELLATION OF U.S. REGISTRATION No. 2,208,108 AND INEQUITABLE CONDUCT

The petition to cancel in this proceeding was for the cancellation of Kellgren's two (2) United States Trademark Registrations Nos. 2,208,106 and 2,208,108.

Curiously in her answer to the petition she agreed to the cancellation of Registration No. 2,208,108 without explanation. Raber's basis for cancellation of the '108 registration, *inter alia*, was the inequitable conduct of Kellgren in using the copyrighted specimens and literature of Raber in the prosecution of her applications without Raber's permission and that the alleged assignment of the House of An-Ju mark from Douchis to Kellgren was a naked assignment with no actual transfer of the business associated with the mark. No response to this contention is found in Kellgren's answer. At page 24 of Raber's Brief at Final Hearing these inequitable conduct and naked assignment issues were treated in respect to both registrations; however, Kellgren failed to make any mention as to why she voluntarily canceled the '108 Registration.

With respect to the charge by Raber that Kellgren acted inequitably in obtaining Registration No. 2,108,106 by using Raber's copyrighted labels and literature, Kellgren maintains that she acted properly because "[t]he specimens submitted and a catalog submitted in the application were used both by Raber and by June Douchis at the time the application was filed" and "[t]hose specimens were being used by both June Douchis and Kellgren in sales of House of An-Ju products"(Kellgren brief pp. 16-17).

It is interesting to note that Kellgren does not and can not point to any specific permission given her to use Raber's intellectual property in secretly obtaining the registrations here involved. Douchis may have had Raber's tacit permission to use his

intellectual property because of their business relationship but there was no business relationship between Raber and Kellgren. Since Kellgren kept the illicit February, 1997 assignment as well as the U.S. Trademark Registrations she obtained secret until after Douchis' death in October of 1999, there would have been no reason for Raber to have given Kellgren permission to do anything let alone use his copyrighted property. The statement in the Kellgren brief at p.16 that she was selling House of An-Ju products (presumably at the time of her use of the Raber labels) is unsupported in the record except on the basis of Kellgren's self-serving statements and alleged hearsay statements of others.

The record reveals that Kellgren did nothing substantive in a business sense before or after the February, 1997 assignment until about October or November, 2000 when she finally is alleged to have obtained suppliers for the House of An-Ju products. Kellgren's business activities prior to June Douchis' death on October 3, 1999 were limited to handling money Douchis obtained from the sale of House of An-Ju products, report it on her income tax returns and then kick back the money in cash to Douchis so that she could defraud the State of New York out of medical benefits.

Kellgren's lack of involvement in the House of An-Ju business is revealed in Kellgren's deposition testimony (Kellgren 292-294) where she testified about her business activities after Douchis' death in October, 1999. Kellgren's testimony is

contrary to her allegations that she was always intimately involved in the House of An-Ju, business. Kellgren testified as follows (Kellgren 293-294) about this period of time and said:

Q. And during that seven-month period, why was there that period of time when there was no sales?

A. Well, I worked with trying to— went to Qualis Labs here. They told me they could get product up and going in two weeks, and they didn't, and they said oh, two more weeks, and they two weeksed me to death until— for three and a half months, and finally I said, "You know, you are either going to make it now or, you know, I've got to find another lab," and so that's what I did. And I told Continental the story, and they said, "Oh, we can do it right away. We'll get this up and running in two weeks."

Q. So during this period of time, this seven months, were you making efforts to try to get the product manufactured for sale?

A. Yes, I was going crazy trying to get the labs to move on this.

.....

Q. And so then when did you begin resuming sales?

A.....I think it was maybe November, October, November of 2000 was it. (Kellgren 293-294)

This testimony alone establishes that Kellgren was not involved in the House of An-Ju business and she had no business interest in or right to use Raber's intellectual property. It also establishes that the February, 1997 assignment was a naked assignment because one who had purchased a business and had been intimately involved in it would not have taken a year (from October, 1999 to November 2000) to continue the sale of House of An-Ju products.

II. CREDIBILITY OF KELLGREN

Kellgren's assertions and testimony should be carefully examined in this

proceeding in evaluating the credibility of the witnesses. Kellgren's case is based on her own self-serving statements and the alleged hearsay statements of others.

The following is a reference to the Kellgren brief regarding the credibility of Kellgren:

A. Kellgren brief, pg. 3, lns. 6-18 (Kellgren's seven month gap in sales).

Kellgren had no knowledge and no documentation that the sales were continuous since 1978. The documents RX 6, 6A-K are in major part unauthenticated, in many cases unreadable and are the self serving writings of Kellgren¹. There is no proof of a sale by Kellgren until November, 2000 of any House of An-Ju products other than Kellgren's self-serving testimony unsupported by any document. Kellgren testified (Kellgren pp 292-293) she made a sale after the death of Douchis (October, 1999) in December, 1999 or January, 2000; however, even this is unsupported by any document and is not believable in view of Kellgren's testimony that she had to obtain manufacturers of the product after the death of Douchis. As pointed out above, it is not believable that Kellgren purchased the House of An-Ju business in February, 1997, was intimately involved in the business at all times thereafter and yet was unable to make a sale of the House of An-Ju products until November, 2000, some thirteen (13) months after the death of Douchis. If Kellgren was intimately involved in the business why did she have to

¹Raber objected to the admission of the documents to the extent that they were not legible. (Kellgren 346).

obtain new manufacturers? Why didn't she simply use the manufacturers that Douchis is supposed to have been using. Also, why did Kellgren have to purchase formulas from Medicia which were ostensibly owned by Douchis. If Kellgren had truly purchased the business and had been intimately involved in the business the sales would have continued smoothly after the death of Douchis with no interruption. Kellgren has been willing to testify to anything in order to retain her wrongfully obtained United States Trademark Registration.

A perfect example of Kellgren's willingness to "say anything" which may aid her cause regardless of the truth or veracity of the statement is best illustrated in her testimony in regard to use of the mark in connection with grooming powders. In her deposition testimony she had no idea (Kellgren-d-34) if grooming powders were sold but in her trial testimony (Kellgren 138) she was more lucid and remembered that they had been sold. The apparent and glaring inconsistency was blamed over on a fall she allegedly had over Douchis' dog just prior to her discovery deposition. The fall was not disclosed at the discovery deposition. When confronted about why she would pay taxes on Douchis' income (Kellgren 86-89) without receiving any money herself, she was beset with a sinus headache.

B. Kellgren brief, pg. 4, ln. 3 to pg. 5 ln. 10 (Kellgren's alleged preparation of the naked assignment and preparation of the trademark application)

The testimony of Kellgren regarding Douchis' fear of Raber taking over the business and her subsequent hiring of an attorney and his review of the so-called assignment and the subsequent preparation of the trademark applications is unverified and we must take the word of Kellgren for this story. We likewise must take her unsupported story that she had specific knowledge of Douchis using the mark on grooming powder. Kellgren's unsupported testimony regarding the relationship between Douchis and two (2) of her suppliers (Medicia and Alzo) is not believable because it appears clear that Kellgren knew nothing regarding these suppliers otherwise it would not have taken her over a year after the death of Douchis to make a sale of the House of An-Ju products.

C. Kellgren brief pg. 8, lns. 20-24 (Seven month gap in sales by Kellgren).

The so-called seven (7) month gap in sales after the death of Douchis is in fact a thirteen (13) month gap as explained above and is further reason to disbelieve the testimony of Kellgren as to the assignment of February, 1997 and her relationship to the House of An-Ju business.

D. Kellgren brief pg. 11, ln. 20 to pg. 14 (Kellgren's claim that the assignment was not a naked assignment).

Kellgren's brief attempts to rehabilitate the so-called assignment document of February, 1997 (PX 45) reproduced as page 12 of the Kellgren brief. The testimony of Kellgren regarding the origin of the assignment is not credible. Kellgren's brief states she

drafted the assignment after a three-way phone conversation with Douchis and a trademark attorney, Luke DeKoster. It is unbelievable that DeKoster or any other intellectual property attorney would have instructed that the assignment take the form it had when it was allegedly executed. The alleged assignment reproduced as page 12 of the Kellgren brief conspicuously does not mention the transfer of the goodwill of the mark and business.

Kellgren's brief attempts to rehabilitate the assignment through the self-serving, unsupported statements of Kellgren or the alleged hearsay statements of others. For example, on page 14 of the Kellgren brief she states that from the date of the assignment (February 1997) Douchis took orders but she, Kellgren, handled the taxes, the numbers, the web site, and actual processing of orders. Other than Kellgren's self-serving statements there is no support for these statements. With respect to taxes we have seen no tax documents. The phrase "the numbers" is meaningless. We have also not seen any evidence regarding a web site in the period after February, 1997 let alone any documents. The record does not support the meaning of "actual processing of orders" Kellgren ran the money from sales made by June Douchis through her credit card apparatus and through her bank for the avowed purpose of permitting Douchis to defraud the State of New York out of medical benefits for which she would not otherwise qualify if she had reportable income.

Kellgren asserts she advertised the House of An-Ju in trade magazines but has conveniently omitted any documentary evidence of this in the record.

As pointed out above there is an absence of testimonial or documentary support for most of the assertions made in the Kellgren brief. Kellgren was not at all involved in the House of An-Ju business until some thirteen (13) months after the death of Douchis.

Kellgren disclosed 572 documents to Raber in this proceeding (Kellgren 273-274) which were represented by Kellgren (Kellgren 274) as being all of the House of An-Ju documents in her possession which evidenced the goodwill of the House of An-Ju business. Counsel for Kellgren stipulated (Kellgren 274) that all of these documents represented the goodwill of the House of An-Ju business yet *not one document was cited in Kellgren's brief as representative of the transfer of the goodwill of the House of An-Ju business.*

Kellgren's assertion that the assignment is valid is not supported by any documentary evidence in the record. This is despite the stipulation of counsel for Kellgren that all 572 documents represent the transfer of the goodwill of the business. In the Kellgren deposition, pg. 274, the stipulation was made part of the record as follows:

Mr. Mitchell (counsel for Raber): And you would stipulate for the record that all--I think there were 572 documents--represent, for the purposes of this proceeding, the transfer of the goodwill of the business to Ms. Kellgren as of February 25, 1997.

Mr. Voorhees (counsel for Kellgren): That's right.

Mr. Mitchell (counsel for Raber): And you are so stipulating?

Mr. Voorhees (counsel for Kellgren): I am stipulating that, and I will argue any of them you want, but that's not for her to argue.

Mr. Mitchell (counsel for Raber): Are you saying that the witness can't identify which of the documents represent the transfer of the goodwill of the business?

Mr. Voorhees (counsel for Kellgren): I'm saying they all represent the transfer, and the legal question of what they represent from the standpoint of the transfer of the business is not for her to answer but for me. It's legal argument. If you want to ask her what she got and what it was used for and how she used it, that's fine. Those are fact questions. But the question of what they are and how they were categorized when they were produced to you is not.

Mr. Mitchell (counsel for Raber): Well, they weren't categorized when they were produced to us.

Mr. Voorhees (counsel for Kellgren): *Well, that's right, because they were all related to the goodwill of the business.* I'm through arguing. Let's go on.

Apparently, Kellgren and her counsel have not decided to use any of the 572 documents which allegedly document the transfer of the goodwill associated with the business and the marks because they do not in fact support the transfer of the goodwill.

III. FIRST USE OF THE MARK

Raber takes no issue with the proposition that Douchis was the first to use the House of An-Ju mark but challenges Kellgren's claim that she is the successor in interest to Douchis as set forth in Section B, page 8 of her brief.

As pointed out above, Kellgren did nothing in the House of An-Ju business other than launder money Douchis receive for the sale of House of An-Ju products so as

to enable Douchis' eligibility for benefits from the State of New York. There is no support in the record that Kellgren sold any House of An-Ju products other than her verbal representations until November, 2000. Since Raber purchased the House of An-Ju mark and business in 1994 as pointed out in detail in his main brief, Raber succeeds to the first use of the mark by June Douchis and is entitled to all of the benefits flowing therefrom.

IV. RABER'S PURCHASE OF THE HOUSE OF AN-JU BUSINESS AND MARK

Kellgren has characterized Raber's contention that he entered into a verbal purchase agreement with Douchis as false, fraudulent and unbelievable. Raber's evidentiary support comprised of documents and testimony is consistent with Kellgren's total lack of activity in the business.

Pages 7-10 of Raber's main brief give a detailed explanation of the acquisition of the House of An-Ju mark by Raber in 1994 and his business activities thereafter. PX 1 is a summary showing Raber's activities regarding the House of An-Ju product line after his purchase in 1994. His efforts are illustrated in the increase in sales. In 1993, before the purchase of the trademark, Raber's sales were just \$7500.00 and increased to \$16,165.00 in 1994, \$35,794.00 in 1997, \$45,000.00 in 1999 and \$63,426.00 in 2000. His advertising, catalog and product liability insurance expenditures are set forth in detail in PX 1 and this summary is supported by backup documents which are all part

of the record. Raber has pointed out in his main brief (pages 8-9) that his payment to Douchis for the business and mark took several forms. One of the methods was to supply Douchis with product for which she did not pay. PX 40 is a summary of invoices which Douchis never paid. Payment is further exemplified in PX 23 wherein Raber testified (Raber 51-52) that the significance of royalty credits was that Douchis was being paid in merchandise rather than cash.

Kellgren's activities in regard to the House of An-Ju business were nonexistent. Kellgren has produced, according to her counsel, all of the company records which amount to approximately 572 documents, which do nothing to support her contention that she was continuously involved with the business. Kellgren has provided just one document, the alleged assignment document, PX 45 to evidence her involvement with the House of An-Ju business and the alleged transfer of goodwill associated with the mark and the business. The totality of Kellgren's evidence is the alleged assignment.

Kellgren has provided a number of documents that illustrate she ran credit card sales obtained by Douchis through her machinery because Douchis had no such facilities. Kellgren declared all of Douchis' sales on her income tax return so that Douchis could get medical benefits from the State of New York. As pointed out above, Kellgren did not know who the manufacturers of the House of An-Ju products were because it took her thirteen (13) months after the death of Douchis before she could get a

product produced and make a sale. The record also reveals that Kellgren purchased formulas from one of Douchis' suppliers, Medicia, for \$7,000 (Kellgren 220) after the death of June Douchis. Does this sound like someone who owned the House of An-Ju mark and/or was intimately involved in the business?

Let us now turn to the points raised in the Kellgren brief which are supposed to illustrate that Raber's claim is false, fraudulent and unbelievable. The first is the press release of PX 27. By some wild stretch of the imagination Kellgren maintains that the statements made in the press release somehow constitute an admission by Raber that he is only a distributor and somehow admits he does not own the mark and the business. Nothing could be further from the truth. The testimony of Raber at pages 103-104 of his deposition puts the language of the press release in proper context. As Raber testified he and Douchis did not intend to disclose the extent of the agreement between them and that the press release was a public relations and advertising effort. It will be noted that nowhere does the release state that Raber does not own the House of An-Ju business.

According to Kellgren another key exhibit is PX 49/ RX1. This is the IRS form 1099 executed by Raber in 1998 showing payment for royalties to Kellgren's social security number. Presumably, Kellgren is incorrectly alleging that RX1 constitutes an admission by Raber that he did not own the mark and the business. Raber's testimony and

the evidence establish that Douchis did not want reportable income paid to her so it was paid to Kellgren instead. Also Raber testified that this was a method of paying Douchis for the business.

Kellgren makes much of the September, 22, 1999 Raber letter (RX 4) where he proposes a purchase of the mark from her for \$750.00. The TTAB will quickly appreciate that this is a proposal for settlement and is a minuscule amount compared to the cost of litigation. It will be noted Raber withdrew his offer in his letter of October 21, 1999 (RX 3).

Raber submits it is Kellgren who is attempting to commit a fraud in the matters at hand, first in obtaining the registrations, second in agreeing to cancel a very similar registration for unstated reasons, and, thirdly for attempting to retain the other registration by maintaining that the assignment of February, 1997 was not a naked assignment and that she in fact ran the business from that time on.

V. THE ALLEGED ASSIGNMENT AND ABANDONMENT

The assignment document of February, 1997 comprises a naked assignment because Kellgren did nothing to manage or run the business from that time on for the reasons fully articulated above. On the abandonment issue as discussed at length in Raber's main brief, Kellgren abandoned the mark because she did not control the nature and quality of the goods sold under the mark until at least November, 2000. As discussed

above she apparently did not know the identity of the manufacturers because she could not obtain a product for sale until some thirteen (13) months after the death of Douchis.

By the same token if the February, 1997 document did not convey the mark and the business to Kellgren, then she succeeded to nothing and the issues should be decided in Raber's favor.

VI. KELLGREN'S BRIEF DOES NOT ADDRESS THE ISSUES RAISED BY RABER

Kellgren has offered no evidence that House of An-Ju business was transferred to her as a going concern. Here, there is an abundance of "contrary evidence" that the House of An-Ju business did not pass to Kellgren as a going concern. See, *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 10 USPQ2d 1550 (7th Cir. 1989).

Nor has Kellgren offered any evidence to rebut Raber's assertion that Kellgren and her alleged predecessor in interest Douchis abandoned the marks. Simply put, Raber was and is House of An-Ju in every way, shape and form.

VII. CONCLUSION

The petition for cancellation should be granted. First the oral contract of sale from June Douchis to Raber in 1994 transferred all of the trademark rights and business to Raber. Raber owns all of the rights to the trademarks. Kellgren would have the TTAB believe that the press release and the IRS form 1099 and other communications

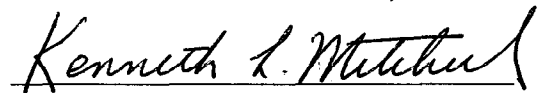
establish fraud by Raber but fail to tell us why or how. Nothing in the documents constitute an admission that Raber did not own the marks and the business. The preponderance of the evidence supports the proposition that Raber, not Kellgren, owned the business and the marks.

With respect to the issue of inequitable conduct, Kellgren takes the position that since Douchis was using the copyrighted material that was owned by Raber that somehow this gave Kellgren the right to use it without permission.

In view of the above, the petition for cancellation should be granted.

Respectfully Submitted,

JEROLD RABER



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CERTIFICATE OF SERVICE

A copy of the above **Reply Brief of Petitioner** was mailed this 18th
day of May, 2002, by United States First Class Mail, to Michael
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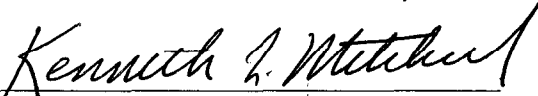
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REQUEST FOR ORAL ARGUMENT AT FINAL HEARING

Now comes the petitioner and respectfully requests oral argument at final hearing.

Respectfully Submitted,

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A copy of the above REQUEST FOR ORAL ARGUMENT AT FINAL HEARING was mailed this 18th day of May, 2002, by United States First Class Mail, to Michael G. Voorhees, McKee, Voorhees & Sease, 801 Grand Avenue, Suite 3200, Des Moines, Iowa 50309-2721, attorneys for Registrant.

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